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IN THE CIRCUIT COURT OF THE
NINTH JUDICIAL CIRCUIT IN AND
FOR ORANGE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO: 2018-CA-012128-O

SHARRIF K. FLOYD

Plaintiff,

vs.

DR. JAMES ANDREWS, M.D.; DR. GREGORY HICKMAN, M.D.; DR. CHRISTOPHER WARRELL, M.D.; DR. TARIQ HENDAWI, M.D.; THE ANDREWS INSTITUTE AMBULATORY SURGERY CENTER, LLC; PARADIGM ANESTHESIA, P.A.; BAPTIST HOSPITAL, INC.; BAPTIST HEALTH CARE CORPORATION; GULF BREEZE HOSPITAL, INC., BAPTIST HOSPITAL, INC. d/b/a GULF BREEZE HOSPITAL; AND BAPTIST PHYSICIAN GROUP, LLC,

Defendants.
_____/

DEFENDANTS' REPLY TO PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO CHANGE VENUE

COME NOW the Defendants, James Andrews, M.D.; Christopher Warrell, M.D.; Tariq Hendawi, M.D.; Baptist Hospital, Inc.; Baptist Physician Group, LLC; and Baptist Health Care Corporation, by and through their undersigned attorneys, and hereby file this Reply to Plaintiff's "Omnibus Memorandum in Opposition to Defendants' Motions to Transfer Venue on *Forum Non-Conveniens* Grounds," and in support thereof would show as follows:

PRELIMINARY STATEMENT

The Defendants' Motion to Change Venue for *forum non conveniens* is governed by Section 47.122, Florida Statutes. The Plaintiff's Omnibus Memorandum largely foregoes any legal analysis of the factors set forth in the statute. Instead, the Plaintiff speculates about airport traffic, courtroom sizes, biased judges, tainted juries, and his personal certainty that the lawsuit he filed will never go to trial. These suppositions are not valid considerations under Section 47.122. When subjected to the objective light of legal analysis, it is clear that the Plaintiff makes no factual or legal case for Orange County as a convenient forum for this litigation. The facts and the law overwhelmingly favor transfer of this case to Santa Rosa County.

SECTION 47.122, FLORIDA STATUTES

Section 47.122, Florida Statutes, provides that "[f]or the convenience of the parties or witnesses or in the interest of justice, any court of record may transfer any civil action to any other court of record in which it might have been brought." The Court may transfer this case to Santa Rosa County if it would be more convenient for the parties, *or* more convenient for the witnesses, *or* if the interests of justice would be better served in Santa Rosa County. Transfer is appropriate if the Defendants show that any one of these factors favors Santa Rosa County over Orange County. *See Telophase Soc. of Florida, Inc. v. State Bd. of Funeral Directors and Embalmers*, 334 So.2d 563, 566-76 (Fla. 1976) ("'Or' when used in a statute is generally to be construed in the disjunctive."); *Ellinwood v. Board of Architecture and Interior Design*, 835 So.2d 1269, 1270 (Fla. 1st DCA 2003) ("The use of a disjunctive in a statute indicates alternatives and requires that those

alternatives be treated separately."). With their motion and its attached affidavits, the Defendants have shown that all three factors favor Santa Rosa County.

Based on the Defendants' affidavits and the case law cited in the Defendants' motion, transfer is appropriate unless the Plaintiff submits affidavits or other evidence showing that Orange County is actually more convenient according to the factors enumerated in Section 47.122. *Eggers v. Eggers*, 776 So.2d 1096, 1098 (Fla. 5th DCA 2001) ("[W]hen a *forum non conveniens* challenge is raised, it is incumbent upon *the parties* to submit affidavits or other evidence that will shed necessary light on the issue of the convenience of the parties and witnesses and the interest of justice.") (emphasis added). In order to properly inform this Court's *forum non conveniens* analysis, it is incumbent upon all parties—both the Defendants and the Plaintiff—to submit evidence that ties this case to a specific venue. *Id.; see Hu v. Crockett*, 426 So.2d 1275, 1279-80 (Fla. 1st DCA 1983) (comparing the 47.122 evidence submitted by the plaintiff with the evidence submitted by the defendant).

The Defendants have identified multiple parties and material witnesses whose testimony, location, and interactions with the Plaintiff tie this case to Santa Rosa County. The Plaintiff, on the other hand, has offered no evidence tying this case to Orange County. In fact, the Plaintiff has not even submitted his own affidavit in opposition to the Defendants' motion. Instead, Brad Sohn, one of the Plaintiff's attorneys, has signed an "affidavit" that merely restates the arguments in the Plaintiff's memorandum. While the Defendants have offered actual evidence that all three factors of Section 47.122 favor transfer to Santa Rosa County, the Plaintiff has only offered notarized argument from

counsel. This, in and of itself, is dispositive and calls for the Court to grant the Defendants' motion. *See Eggers*, 776 So.2d at 1097-98.

In *Eggers*, the plaintiff Ellen Eggers sued the defendant Frederick Eggers in Citrus County. *Id.* at 1097. The trial court denied Frederick's motion to change venue to Hillsborough County, and the Fifth DCA reversed, based on the evidence that was presented to the trial court:

> Frederick filed a sworn motion to transfer/dismiss and attached affidavits from prospective witnesses indicating they resided in Hillsborough County and that it would be a hardship if they had to travel to Citrus County to testify. Ellen countered with no sworn evidence on the relevant issues. Ellen's unsworn response does not constitute evidence. The trial court had before it only evidence that the more convenient forum is Hillsborough County. Under these circumstances, it was an abuse of discretion to fail to transfer venue to Hillsborough County under section 47.122.

Id. at 1098 (internal citation omitted). Similarly, the only evidence before this Court is that Santa Rosa County is the most convenient forum for the parties, material witnesses, and the interests of justice. The Plaintiff has only submitted argument from one of his attorneys.

The Convenience of the Parties

As to whether the convenience of the parties favors venue in Santa Rosa County versus Orange County, the Plaintiff's argument focuses on Orlando's airport. (Pl.'s Opp'n at 4, 11.) He argues that "this action involves parties not just from two counties, but from four states (Pennsylvania, Florida, Texas, and Alabama)," then asserts that "Orange County is far easier to travel into—for most everyone—than would be either panhandle county." (*Id.* at 11.) As a *forum non conveniens* argument, this has no legal

support. The Plaintiff does not cite any case law in which a Florida court considered airport convenience in a Section 47.122 analysis. Lacking legal support, this argument also lacks factual support. No parties have submitted affidavits claiming that it would be easier for them to travel to Orange County than Santa Rosa County. The only support the Plaintiff offers are the opinions in Mr. Sohn's affidavit.

Regardless, the accessibility of Orlando's airport is irrelevant, because every meaningful aspect of this case ties it to the Florida panhandle, starting with the convenience of the parties. As the Defendants demonstrated in their motion and affidavits, they are all personally and/or professionally connected to Santa Rosa County and adjacent Escambia County. Baptist Hospital, Inc., Baptist Physician Group, LLC, and Baptist Health Care Corporation are located and do business in Escambia and Santa Rosa. (Raynes Aff. at ¶¶ 1-4, 6), (Cardwell Aff. at ¶¶ 1-4, 6), (Faulkner Aff. at ¶¶ 1-4, 6.) Dr. Andrews resides in Escambia County, not Alabama as the Plaintiff claims. (Andrews Aff. at ¶ 7.) He practices medicine, sees patients, and performs surgery almost exclusively in Santa Rosa County. (*Id.* at ¶¶ 1, 7.) Dr. Hendawi, a Texas resident, observed the Plaintiff's surgery in Santa Rosa County, has no connection to Orange County, and joins the motion to change venue. (Hendawi Aff. at ¶¶ 2-4.) Dr. Warrell, the only party in this lawsuit with any connection to Orange County, only saw the Plaintiff in Santa Rosa County. (Warrell Aff. at ¶ 2, 3.) Dr. Warrell currently lives in Orlando, but he joins in the motion to change venue. (*Id.* at ¶ 4.) The accessibility of Orlando's airport is a legally invalid reason for setting aside the parties' proximities and connections to Santa Rosa County.

The Plaintiff argues that the Defendants' lack of connection to Orange County does not matter, because the attorneys will travel to each of the Defendants' locations for their depositions. This is true according to Rule 1.410(e)(2), Florida Rules of Civil Procedure, regardless of where the case goes to trial. The real concern, however, is not where the depositions will take place, but whether the case will go to *trial* in a venue most conducive for live testimony by the parties and material witnesses. *See Hu*, 426 So.2d at 1279. To sidestep the bullseye this places on Santa Rosa County, the Plaintiff claims throughout his Memorandum that this case will not actually go to trial. (Pl.'s Opp'n at 4, 5, 11, 12.) The Plaintiff's Complaint asks for $180,000,000 in damages, and the Defendants respectfully suggest that the likelihood of this matter going before a jury is far from "hypothetical" as the Plaintiff suggests. (*Id.* at 5.) Surely the Plaintiff would not have filed a lawsuit of this magnitude unless he was fully prepared to litigate all the way to a jury verdict if necessary. A trial in Santa Rosa County would be most conducive to live testimony, and the Plaintiff's predictions about the outcome of this case should not impact the Court's *forum non conveniens* analysis.

The Convenience of the Witnesses

The Plaintiff cannot show that any material witness, other than Dr. Warrell, has a connection to Orange County, so he argues instead that the witnesses will be all over the country. (Sohn Aff. at ¶ 8.) This assertion ties into the Plaintiff's argument that the accessibility of Orlando's airport should be a deciding factor in the Court's *forum non conveniens* analysis. In other words, these witnesses from across the country should not be subjected to flights into the Florida panhandle, regardless of any Section 47.122

considerations.

Mr. Sohn's affidavit includes a laundry list of people he claims "with a reasonable degree of confidence" may have "knowledge" in this case. (*Id.*) Of the dozens of listed names, only one person, a former Minnesota Vikings strength coach, is located in the Orlando area. (*Id.*) Some of the names are identified by profession and some are identified by location, but none are identified by the scope of their anticipated testimony. (*Id.*) Instead of identifying material witnesses in Orange County and providing affidavits outlining the scope of their testimony, the Plaintiff has simply listed people across the county who apparently had some degree of contact with the Plaintiff during his football career. This does not create a "convenience of the witnesses" argument that favors Orange County over Santa Rosa County.

The names the Plaintiff has thrown out are just names. The Plaintiff has given no indication that they are *material* witnesses, let alone material witnesses with ties to Orange County. In *Hu v. Crocket*, the First DCA explained why the convenience of *material* witnesses is an important consideration under Section 47.122:

> The convenience of the witnesses is probably the single most important consideration of the three statutory factors. This is based on the perception that material witnesses should be located near the courtroom to permit live testimony. *In order for a court to consider the convenience of the witnesses, the court must know who the witnesses are and the significance of their testimony.*
>
> The court would need this information to ascertain whether a particular witness' testimony is material. Second, the court might desire to have this information in an effort to locate the trial in a forum most convenient to the greatest number of key witnesses, since the quality of testimony by a key witness may well outweigh the quantity of testimony by a number of witnesses testifying to

> relatively unimportant matters. *Therefore, it is apparent that the witnesses who will be called, especially the key witnesses, should be specified with a general statement as to the nature of their testimony*.

426 So.2d at 1279 (emphasis added) (internal citations omitted).

The Defendants have identified numerous material witnesses in the Florida Panhandle who indicate it would create a hardship for them to travel to Orange County to participate in this litigation. *See* (Andrews Aff. at ¶¶ 1, 6-8); (Raynes Aff. at ¶¶ 1, 4, 6, 8); (Faulkner Aff. at ¶¶ 1, 4, 6, 8); (Cardwell Aff. at ¶¶ 1, 4, 6, 8). The Plaintiff attempts to undermine the testimony of these material witnesses, not with any evidence, but by pointing out that they do not use the word "substantial" to describe the hardship of travelling from the Florida panhandle to Orange County. (Pl.'s Opp'n at 7-8.) The witnesses are not required to use "magic words," and the Court is able to determine whether or not the witnesses would suffer a hardship in the context of a *forum non conveniens* analysis. *See Botta v. Ciklin, Lubitz & O'Connell*, 222 So.3d 605, 607 (Fla. 4th DCA 2017) (finding that requiring material witnesses to travel 200 and 135 miles would be "extremely inconvenient").

The Defendants' material witnesses have also set forth the nature of their testimony. *See* (Andrews Aff. at ¶¶ 2-5); (Raynes Aff. at ¶¶ 4-7); (Faulkner Aff. at ¶¶ 4-7); (Cardwell Aff. at ¶¶ 1, 4-7). Their testimony goes directly to, among other things, the Plaintiff's injuries, the medical care surrounding his surgery, and the relationships among all of the Defendants. The affidavits also affirm that any other individuals with knowledge of these matters (i.e. those who assisted in the Plaintiff's care as well as the

agents, employees, and officers of the Baptist entities) will also be in the Florida Panhandle. The witnesses' testimony about the relationships among the Defendants is particularly important, because the Plaintiff alleges that all of the Defendants are so interrelated that they are each liable for the actions of the others. Unlike the Defendants, the Plaintiff has not described the anticipated testimony of a single material witness, let alone one who is located in Orange County. The Plaintiff has not shown that the convenience of the witnesses favors Orange County over Santa Rosa County.

The Interests of Justice

In his memorandum, the Plaintiff does not specifically address the "interest of justice," which is the third prong of Section 47.122. This is a "catch-all" provision, however, and the Plaintiff throws out several passing assertions that can certainly be described as "catch-all." The Defendants, therefore, will address them here.

With a procession of unsupported allegations, the Plaintiff argues that venue should remain in Orange County because, among other things:

- Orange County has a better courthouse than Santa Rosa County (Pl.'s Opp'n at 4);
- Orlando has a better airport than Pensacola (*Id.* at 4);
- It would be easier for everyone, including defense counsel in Tallahassee and the Defendants in the Florida panhandle, to travel to Orlando for a trial (*Id.* at 4-5);
- Orlando has a significant interest in "policing" Dr. Warrell and Dr. Andrews (*Id.* at 5);
- Any judge in Santa Rosa County would be inherently biased against the Plaintiff and automatically give the Defendants "every benefit of the doubt" (*Id.*); and

- Any jury in Santa Rosa would be tainted and automatically biased against the Plaintiff because he is "a minority northerner." (*Id.* at 5-6.)

The Plaintiff does not cite a single case in which a Florida court conducting a *forum non conveniens* analysis took into account anything similar to these allegations. Regardless, they are unfounded.

To begin with, the Plaintiff has no basis to suggest that the First Judicial Circuit of Santa Rosa County, with its six Circuit Judges, could not handle this case. This is a curious argument for the Plaintiff to make if he truly believes this matter will never go to trial. As for travel, Pensacola has an International Airport. The Florida panhandle is not a remote, undeveloped province as the Plaintiff seems to suggest. Tallahassee, where some of the defense lawyers are located, is approximately 175 miles from Santa Rosa County (about a three hour drive) and 250 miles from Orange County. It is unclear why the Plaintiff thinks it would be substantially easier for anyone from Tallahassee to travel to Orlando over Santa Rosa County. If Orange County is interested in "policing" Dr. Warrell, then Santa Rosa County has a stronger interest in "policing" him for treatment he rendered while he practiced medicine there. If Orange County is also interested in "policing" Dr. Andrews because "he regularly travels here on business and speaks here" (*Id.* at 5), then Santa Rosa certainly has a stronger interest, since he almost exclusively practices medicine there. As for the notion that the judges and juries in Santa Rosa are inherently tainted with nefarious biases, the Defendants respectfully suggest that the Court should not entertain such inflammatory and completely unsubstantiated rhetoric.

The Plaintiff's Case Law

In their motion, the Defendants cite over 15 cases that analyze the three consideration of Section 47.122, each case supporting changing venue to Santa Rosa County. The Plaintiff's response makes no attempt to distinguish these cases from the issues before this Court. In addition, the Plaintiff offers no analysis of any Florida cases that favor maintaining venue in Orange County according to Section 47.122. Instead, the Plaintiff offers a string-cite of cases that mention a plaintiff's right to initially select venue. As discussed below, however, the actual holdings of those cases do not contravene the Defendants' motion.

The Plaintiff's reliance on this Court's recent decision in *Blanco et al. v. G4S Secure Solutions (USA) Inc.* is misplaced. In *G4S Secure Solutions*, the plaintiffs brought suit in Orange County against the company that employed the shooter responsible the PULSE Nightclub attack on June 12, 2016. *See Blanco et al. v. G4S Secure Solutions (USA) Inc.*, No. 2018-CA-006288-O, Compl. at 1–5, 17–18 (Fla. 9th Cir. Ct. June 11, 2018). The defendant filed a motion to transfer the case to the Palm Beach County, where the defendant was already defending numerous lawsuits related to the same shooting incident. *Blanco et al.*, No. 2018-CA-006288-O, Def.'s Mot. Trans. Ven. at 2–5 (Fla. 9th Cir. Ct. Sept. 24, 2018). The defendant alleged that being able to defend itself in one venue would save judicial resources. *Id.* at 4–5. The defendant further argued that the Court should consolidate the cases to prevent forum shopping and the possibility of inconsistent outcomes. *Id.* at 4–6. In response, the plaintiffs pointed out, among other things, that the defendant submitted no affidavits that demonstrated the significance of

the testimony of the witnesses who would be inconvenienced by the Orange County venue. *Blanco et al.*, No. 2018-CA-006288-O, Pls.' Resp. at 4–5 (Fla. 9th Cir. Ct. Nov. 30, 2018). This Court denied the motion to change venue for reasons stated on the record. *Blanco et al.*, No. 2018-CA-006288-O, Order Den. Mot. Trans. Venue (Fla. 9th Cir. Ct. Dec. 19, 2018). Unlike the defendants in the PULSE litigation, the Defendants here are not moving to consolidate cases, and they have filed numerous affidavits demonstrating the testimony of the material witnesses in Santa Rosa and Escambia County.

In *Safety Nat'l Cas. Corp. v. Florida Mun. Ins. Trust*, 818 So.2d 612 (Fla. 5th DCA 2002), the plaintiff sued the defendant for breach of contract in Orange County, and the defendant moved to change venue to Pinellas County. The trial court denied the motion, and the Fifth DCA affirmed without discussing the three factors of Section 47.122. *Id.* at 612-14. After noting that there were numerous cases "where an appellate court has found an abuse of discretion in failing to make a *forum non conveniens* venue change," the appellate court explained that the issue before it was not one of *forum non conveniens*:

> Here, the issue is not how many witnesses live where and where documents or other evidence are located. Here the issue is essentially a legal one: what evidence is relevant and material to the issues of late notice and prejudice.

Id. at 613. *Safety Nat'l* does not address the issues raised in the Defendants' motion to change venue. The issues before this Court *are* where the witnesses and evidence are located.

AHG Tax Credit Fund XVIII, LLC v. Blitchen Station, Ltd., 200 So.3d 117 (Fla. 5th DCA 2016), also fails to address the issues before this Court. In *AHG*, the defendants moved to change venue from Marion County in order to consolidate it with a related lawsuit pending in Orange County. *Id.* at 118. The defendants ostensibly argued that the "interests of justice" favored consolidation in Orange County, with no discussion of the location of parties, witnesses, evidence, or underlying events. *Id.* at 119-20. The Fifth DCA rejected the defendants' argument, noted that the defendants submitted no affidavits in support of their motion, held that that transfer would needlessly complicate the litigation, and found no risk of inconsistent verdicts. *Id.* at 120. Nothing in *AHG* indicates that the Plaintiff's case should remain in Orange County.

Procedurally, *Hall v. Animals.com, LLC*, 171 So.3d 216 (Fla. 5th DCA 2015), was decided on matters not before this Court.[1] In *Hall*, the defendant filed a motion to dismiss based on "improper venue," not *forum non conveniens* under Section 47.122. *Id.* at 217. At the final hearing, however, the defendant argued for the first time that the convenience of the parties favored change of venue. *Id.* The trial court granted the request to change venue, but the Fifth DCA reversed, because the trial court entertained the *forum non conveniens* argument without giving the plaintiff advanced notice. *Id.* at 218. It was error for the trial court to deny the plaintiff the "opportunity to prepare her argument in opposition or to submit affidavits or other evidence" on the Section 47.122

[1] In their motion, the Defendants cite *Hall* for the well-settled maxim that "[i]n order to consider and weigh the convenience of the witnesses under section 47.122, the court must know who the witnesses are and the significance of their testimonies." *Id.* at 218 (citing *Brown & Williamson Tobacco Corp. v. Young*, 690 So.2d 1377, 1379 (Fla. 1st DCA 1997).

issues. *Id.* *Hall* was decided on procedural grounds; there was no affirmative finding that the plaintiff's chosen venue was the most convenient.

In *R.J. Reynolds Tobacco Co. v. Mooney*, 147 So.3d 42 (Fla. 3d DCA 2014), the trial court denied the defendants' motion to change venue from Miami-Dade County to Duval County. The Third DCA upheld the denial, because the defendants' motion failed to substantively address the criteria of Section 47.122. *Id.* at 43-46. First, the defendants made no argument that it would be inconvenient for them to try the case in Miami-Dade County. *Id.* at 43. Second, the defendants failed to identity a single defense witness who would have been inconvenienced by keeping the case in Miami-Dade. *Id.* at 44-45. Third, the defendants' "interests of justice" argument was without factual basis and required the trial court to speculate on the different judicial resources available in the competing venues. *Id.* at 45-46.

Other cases the Plaintiff cites are distinguishable on their faces and do not warrant detailed analysis. For example, in *A-Ryan Staffing Solution, Inc. v. Ace Staffing Management Unlimited*, 917 So.2d 1000 (Fla. 5th DCA 2005) the issue was whether venue was *proper* given the corporate defendant's residence according to Sections 47.021 and 47.051, Florida Statutes. *Id.* at 1001-05. There was no discussion in *A-Ryan* of *forum non conveniens* or the three factors set forth in Section 47.122. *Id.* Also, in *Resor v. Welling*, 44 So.3d 656, 657 (Fla. 5th DCA 2010), it was error for the trial court to grant a motion to change venue when the movant relied on "woefully insufficient" arguments and "did not file affidavits or offer evidence to meet his burden."

Houchins v. Florida East Coast Ry. Co., 388 So.2d 1287 (Fla. 3d DCA 1980), however, does warrant discussion. There, the plaintiff, Houchins, lost his legs when he was struck by a train operated by the Florida East Coast Railway Company ("FEC"). When Houchins filed suit in Dade County, FEC moved to transfer venue to Broward County, where the accident occurred. *Id.* at 1288-89. The trial court granted FEC's motion, finding in part that the convenience of the parties and witnesses favored transfer to Broward. *Id.* at 1289. The Third DCA strongly disagreed, reversed, and detailed the reasons why Dade—Houchins' chosen forum—was clearly the more convenient venue for the parties and witnesses.

> It is abundantly clear from the record that any claim by the railroad that the convenience of the parties or witnesses would be served by a transfer to Broward County is sadly deficient. Houchins had been treated at the Veteran's Administration Hospital in Miami, Dade County, since shortly after the accident. He underwent extensive medical and psychological treatment and rehabilitative training in Dade County during the course of which nearly fifty physicians, psychologists, specialty care nurses, consultants, physical therapists and other health care personnel were involved. As of January 1980, Houchins was to reside full time in the Veteran's Administration Hospital in Dade County to undergo additional amputations on his legs, which surgery and treatment would involve five more Dade County surgeons and physicians. The train's engineer was a Dade County resident; Houchins' friend and brother, both residents of Dade County, were the two persons best able to testify to his condition before and after the accident. Indeed, the only Broward County witnesses were seven police officers who came to the scene after the accident occurred.

Id. at 1289. *Houchins* offers a striking example of a case in which the plaintiff's chosen forum was also the most convenient under Section 47.122. Plaintiff cites *Houchins* in his opposition brief, but the case only highlights the lack of any meaningful connection

between his lawsuit and Orange County. The *Houchins* case's connections to Dade County are actually analogous to this case's connections to Santa Rosa County.

CONCLUSION

The facts and the law support changing venue to Santa Rosa County according to Section 47.122, Florida Statutes. The Defendants submitted evidence showing that the convenience of the parties, the convenience of the witnesses, and the interests of justice overwhelmingly favor Santa Rosa County over Orange County. That is the only evidence before this Court. The Plaintiff does not and cannot show that this case has any meaningful connection to Orange County.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via the Florida Court's e-Filing Portal on this 6th day of February, 2019 to:

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